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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DELIA GABRIELSON, Plaintiff/Appellee, v. VINTON FUGATE, Defendant/Appellant, and ARIZONA STATE LIQUOR BOARD, Defendant/Appellee.	2 CA-CV 2007-0088 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200600849

Honorable William J. O'Neil, Judge

VACATED AND REMANDED

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P E L A N D E R, Chief Judge.

¶1 After the Arizona State Liquor Board (the "Board") granted appellant Vinton Fugate a liquor license for his restaurant in May 2006, the superior court reversed the Board's decision. Fugate appeals from the court's order, contending the court erred by analyzing and applying zoning laws neither considered by the Liquor Board nor pertinent to its decision, improperly re-weighing the evidence, and misstating facts in the administrative record. We conclude the court erred in basing its order largely on inapplicable zoning-related grounds and reversing outright the Liquor Board's decision for lack of substantial supporting evidence. But, because we also conclude the Liquor Board failed to comply with the requirements of A.R.S. § 41-1092.07(F)(1), we cannot uphold its decision. Therefore, we vacate the court's order and remand the case to the superior court with instructions to remand the matter to the Board to conduct any further proceedings it deems necessary and issue appropriate findings and conclusions as required by law.

Background

¶2 Since the early 1980s, Fugate has owned and operated the Mining Camp Restaurant (Mining Camp) in Apache Junction.[1] The restaurant has been serving food since

[1]Throughout his opening and reply briefs, Fugate fails to properly cite the 450-page administrative record as required by Rule 13(a)(6), Ariz. R. Civ. App. P. We caution counsel that such omissions may result in this court's dismissing an appeal or disregarding sections of the brief that fail to comply with the rules. *See State Farm Mut. Auto. Ins. Co.*

it first opened in 1961. At that time, only about twenty houses were located within a square mile of the Mining Camp. Later, Pinal County rezoned the area immediately around and including the restaurant for single-family residential use only. After that zoning change, a residential neighborhood grew up around the restaurant. Because the Mining Camp existed before the rezoning, Fugate has been operating it under a nonconforming-use permit. *See* A.R.S. § 11-830(A)(1).

¶3 Fugate first applied for a liquor license for the restaurant in 2002. The Liquor Board denied the application in 2003 based on public protest and "planning and zoning problems associated with the premises to be licensed." After Fugate requested a rehearing, the Liquor Board reversed its decision, approving and issuing the license (No. 12113067) in December 2003.

¶4 On review, in October 2005, the superior court vacated that decision because the application for the license had been placed inside the restaurant and, therefore, had failed to comply with the statutory requirement that notice be posted in a "conspicuous place on the front of the premises." A.R.S. § 4-201(B). During the interval between late 2003 and the superior court's ruling, Fugate sold only beer and wine at the restaurant even though his first license, like the one now under review, also authorized the sale of spirituous liquor. The restaurant was not inspected, nor were any liquor law violations reported during that time.

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v. Novak, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990); *Flood Control Dist. v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985).

¶5 Instead of taking further action on his first application, Fugate applied for a new liquor license (No. 12113112) in December 2005. The Pinal County Board of Supervisors ("BOS") considered the application in February 2006, pursuant to § 4-201(C). Several neighbors wrote letters of protest and testified at the hearing. The BOS expressed concern that granting a liquor license would be "contrary to zoning" and noted county staff was "not trained to . . . enforce liquor law." Accordingly, the BOS unanimously recommended disapproval of the license in February 2006.

¶6 Pursuant to § 4-201(E), the Liquor Board held a public hearing in May 2006 to determine whether Fugate's application should be granted. Some patrons submitted a petition and letters in favor of the liquor license, expressing their belief that it would help Fugate stay in business and thus preserve part of Pinal County's history. Many neighbors who lived within a mile of the restaurant protested, however, and spoke in opposition at the hearing.

¶7 The Board unanimously concluded Fugate met all pertinent requirements for issuance of a liquor license. *See* A.R.S. § 4-203(A); Ariz. Admin. Code R19-1-102. Fugate was granted a restaurant liquor license, which allows the sale of beer, wine, and spirituous liquor from 6:00 a.m. until 2:00 a.m. six days a week and from 10:00 a.m. until 2:00 a.m. on Sunday. *See* A.R.S. §§ 4-205.02; 4-209(B)(12); 4-244(15), (17); Ariz. Admin. Code R19-1-317. One of the opponents who lived within a mile of the restaurant, appellee Delia Gabrielson, appealed the Board's decision to the superior court. *See* A.R.S. §§ 12-904, 12-905. She named both Fugate and the Liquor Board in her complaint, and both appeared as defendants.

¶8 Based on its review of the administrative record and the parties' written memoranda on appeal, the superior court reversed the Liquor Board's decision. The court ruled that the Board had failed to cite any evidence or make detailed factual findings to support its granting of the liquor license, that its decision was not supported by substantial evidence, and that the restaurant "is not grandfathered for liquor sales[,] and zoning does not permit a license for the sale of beer and wine [at the restaurant], let alone the license" in question. This appeal followed.

Discussion

I. Preliminary procedural issues

¶9 Final decisions of the Liquor Board are subject to judicial review pursuant to the Administrative Review Act, A.R.S. §§ 12-901 through 12-914. *See* A.R.S. §§ 4-211(A). This court has jurisdiction of this appeal pursuant to § 12-913 of the Act. *See also Ariz. Podiatry Ass'n v. Dir. of Ins.*, 101 Ariz. 544, 547, 549, 422 P.2d 108, 111, 113 (1966); *Siegel v. Ariz. State Liquor Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 1991). Nonetheless, Gabrielson argues on various grounds that the appeal should be dismissed. Preliminarily, we first set forth the procedural background underlying her arguments before we address them.

¶10 The Liquor Board filed a timely notice of appeal from the superior court's ruling but later asked to withdraw its appeal because it was "not a real party of interest." When the Liquor Board contacted her before moving to withdraw, Gabrielson did not object. This court then dismissed the appeal "as to the Arizona State Liquor Board." Thereafter, Gabrielson moved for reconsideration, but only "to the extent necessary for [the

court of appeals] to retain jurisdiction in order to consider appellee's parallel motion for an award of obligatory attorney's fees pursuant to A.R.S. § 12-348." This court denied that motion.

¶11 Based on that procedural posture of the case during the initial briefing process, Gabrielson argued in her answering brief that the appeal should be dismissed because Fugate lacks standing, the Liquor Board is an indispensable party, and the superior court's judgment "has become final and now stands as *res judicata*" against the Board. Section 12-908, A.R.S., requires that the agency be a defendant at the superior court level "[i]n an action to review a final decision of an administrative agency." *See Burrows v. Taylor*, 129 Ariz. 212, 214, 630 P.2d 35, 37 (App. 1981). Generally, an administrative agency's "status as a necessary or indispensable party" does not change when the matter is appealed." *Id*. But an agency's "failure to appeal an adverse ruling affecting its order" should not "control further judicial review of that ruling." *Id.* at 215, 630 P.2d at 38. Other aggrieved parties to the proceedings, such as Fugate, "have standing to prosecute the appeal in their own right," *id*., but the administrative agency "must be made a party to the appeal either as a voluntary appellant or an involuntary appellee." *Id*.

¶12 In view of these principles, we find no merit in Gabrielson's standing argument. *See id*. Citing *Warth v. Seldin*, 422 U.S. 490, 509 (1975), Gabrielson contends the doctrine of prudential standing applies because Fugate "seeks as a third party to vindicate the alleged right of the Liquor Board to remain free of purportedly unwarranted judicial interference." That doctrine applies when a litigant attempts to assert "rights or legal interests of others in order to obtain relief from injury to themselves." *Id*. In *Warth*, the

Supreme Court concluded that taxpayers who claimed economic injury due to a zoning practice did not have standing because they failed to demonstrate either that they were personally subject to the zoning laws or were related to those persons actually affected by the laws. *Id*. at 509-10.

¶13 Unlike the taxpayers in *Warth*, Fugate was personally affected adversely by the superior court's reversal of the Liquor Board's decision. Rule 1, Ariz. R. Civ. App. P., allows "any party aggrieved by the judgment" to appeal. A party is aggrieved when the judgment denies him a personal or property right or imposes a substantial burden on him. *See Kerr v. Killian*, 197 Ariz. 213, ¶ 10, 3 P.3d 1133, 1136 (App. 2000); *cf. Mendelsohn v. Superior Court*, 76 Ariz. 163, 165, 169-70, 261 P.2d 983, 985, 988 (1953) (phrase "'person aggrieved'" in former liquor licensing statute "conferred the right of appeal upon applicant and remonstrant alike"). Fugate presented evidence at the Liquor Board hearing that he suffered injury in the form of lost income potential because he could not serve alcohol at his restaurant. The superior court's ruling deprived him of the liquor license the Board had granted. Therefore, Fugate is an aggrieved party for purposes of this appeal.

¶14 With respect to Gabrielson's argument that the Board is an indispensable party, in view of *Burrows*, we ordered and received the parties' supplemental briefs on that issue. The Liquor Board acknowledged that the principles stated in *Burrows* apply to it and, therefore, that it still is a necessary party to the appeal and should remain in the case as an appellee. This court agreed, clarified its prior order dismissing the appeal as to the Board, and designated the Board as an appellee. *Cf. City of Phoenix v. 3613 Ltd.*, 191 Ariz. 58, 60, 952 P.2d 296, 298 (App. 1997) (on superior court's administrative review of Liquor

Board's decision to grant license transfer, "Board chose to participate as a nominal party, taking no [active] part in defending its decision"). Accordingly, finding no standing issues, no lack of subject matter jurisdiction,[2] and no other procedural obstacles, we now turn to the merits of Fugate's appeal.[3]

II. General principles of administrative review

¶15 A superior court's review of an administrative decision is governed by statute:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E). Here, the superior court did not "hold an evidentiary hearing" and did not admit any new "exhibits and testimony," § 12-910(A), (B), but rather based its ruling on its review of the lengthy administrative record. Therefore, "this Court, on appeal, may substitute its opinion for that of the Superior Court inasmuch as we are reviewing the same record." *Sevilla v. Sweat*, 9 Ariz. App. 183, 185, 450 P.2d 424, 426 (1969); *see also*

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[2]Gabrielson acknowledges "[t]his Court has jurisdiction pursuant to A.R.S. § 12-120.21(A)(1)." *See also* § 12-913.

[3]We also note Gabrielson acquiesced in the Liquor Board's voluntary withdrawal from the appeal as an appellant and has not argued or shown any resulting prejudice. *Cf. Golembieski v. O'Rielly R.V. Ctr., Inc.*, 147 Ariz. 134, 136, 708 P.2d 1325, 1327 (App. 1985) (if party omitted from appeal had adequate notice of appeal and opportunity to participate, and if remaining parties not substantially prejudiced by absence of omitted party, dismissal not necessarily required). In view of Gabrielson's failure to object to the Board's motion to withdraw its appeal, the Board's current status as appellee, and "[i]n keeping with the policy favoring disposition of appeals on the merits," *id*. at 135, 708 P.2d at 1326, we do not find dismissal of the appeal appropriate here.

Carlson v. Ariz. State Pers. Bd., 214 Ariz. 426, ¶ 13, 153 P.3d 1055, 1059 (App. 2007) ("On appeal [from superior court's ruling on administrative review], we review de novo the superior court's judgment, reaching the same underlying issue as the superior court: whether the administrative action was not supported by substantial evidence or was illegal, arbitrary and capricious, or involved an abuse of discretion."); *Siler v. Ariz. Dep't of Real Estate*, 193 Ariz. 374, ¶ 14, 972 P.2d 1010, 1014 (App. 1998).

¶16 "[U]nder the Administrative Review Act, neither the superior court nor the court of appeals weighs the evidence." *Carondelet Health Svcs. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 502, 504, 897 P.2d 1388, 1390 (App. 1995) (citations omitted); *see also Siler*, 193 Ariz. 374, ¶ 41, 972 P.2d at 1018; *Plowman v. Ariz. State Liquor Bd.*, 152 Ariz. 331, 335, 732 P.2d 222, 226 (App. 1986). "We must allow the board's decision to stand if there is some credible evidence to support it." *M & M Auto Storage Pool, Inc. v. Chem. Waste Mgmt., Inc.*, 164 Ariz. 139, 143, 791 P.2d 665, 669 (App. 1990). The relevant inquiry is "whether there was substantial evidence to support the administrative decision." *Carondelet Health Svcs.*, 182 Ariz. at 504, 897 P.2d at 1390; *see also* § 12-910(E). If there is "any competent evidence to support the decision of the Board, it must be upheld—even though an opposite conclusion could also have been reached." *Garcia v. Ariz. State Liquor Bd.*, 21 Ariz. App. 456, 459, 520 P.2d 852, 855 (1974); *see also Siler*, 193 Ariz. 374, ¶ 56, 972 P.2d at 1020; *Petras v. Ariz. State Liquor Bd.*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981); *Ariz. State Liquor Bd. v. Jacobs*, 20 Ariz. App. 166, 170, 511 P.2d 179, 183 (1973).

III. Applicable law and review of Liquor Board decision

¶17 The superior court expressly acknowledged the foregoing standards governing its review of the Liquor Board's decision. Nonetheless, finding that the Board's action "is not supported by substantial evidence, is contrary to law, is arbitrary and capricious and is an abuse of discretion," the court ruled the Board "erred [in] granting the license."

¶18 Fugate argues the court "applied an incorrect standard of review, improperly re-weighed evidence, and misstated the record." He contends the court "gave no deference to the experience and expertise of the Liquor Board, but instead improperly substituted its own judgment." Fugate further argues the court "cited to evidence in the record that was sufficient to support the conclusion of the Liquor Board . . . , then improperly elected an alternate factual conclusion." Similarly, he asserts, "The superior court did *not* find or conclude that the discussions of the Liquor Board members were not supported by substantial evidence, but instead made a wrongful determination that those discussions did not support the alternate conclusion."

¶19 Section 4-203(A), A.R.S., provides that "[a] spirituous liquor license shall be issued only after satisfactory showing of the capability, qualifications and reliability of the applicant and . . . that the public convenience requires and that the best interest of the community will be substantially served by the issuance." The applicant bears the burden of demonstrating those elements. § 4-201(G). To implement those statutory mandates, the legislature also directed the Liquor Board to

> adopt, by rule, guidelines setting forth criteria for use in determining whether the public convenience requires and the best interest of the community will be substantially served by the issuance or transfer of a liquor license at the location applied for. These guidelines shall govern the recommendations

> and other approvals of the department and the local governing authority.

§ 4-201(I).

¶20 In accordance with that directive, the Board adopted a regulation, Ariz. Admin. Code R19-1-102, which provides:

> Local governing authorities and the Department may consider the following criteria in determining whether public convenience requires and that the best interest of the community will be substantially served by the issuance or transfer of a liquor license at a particular unlicensed location:
>
> 1. Petitions and testimony from persons in favor of or opposed to the issuance of a license who reside in, own or lease property in close proximity.
> 2. The number and series of licenses in close proximity.
> 3. Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.
> 4. The residential and commercial population of the community and its likelihood of increasing, decreasing or remaining static.
> 5. Residential and commercial population density in close proximity.
> 6. Evidence concerning the nature of the proposed business, its potential market, and its likely customers.
> 7. Effect on vehicular traffic in close proximity.
> 8. The compatibility of the proposed business with other activity in close proximity.
> 9. The effect or impact of the proposed premises on businesses or the residential neighborhood whose activities might be affected by granting the license.
> 10. The history for the past five years of liquor violations and reported criminal activity at the proposed premises provided that the applicant has received a detailed report(s) of such activity at least 20 days before the hearing by the Board.

11. Comparison of the hours of operation of the proposed premises to the existing businesses in close proximity.
12. Proximity to licensed childcare facilities as defined by A.R.S. § 36-881.

¶21 In granting Fugate's application for a liquor license, the Board issued the following factual findings and legal conclusions:

FINDINGS OF FACT

1. This is an original application for restaurant liquor license number 12113112.
2. The Pinal County Board of Supervisors recommended disapproval of this application.
3. The Department of Liquor Licenses and Control is not protesting this application.
4. There are letters of public protest on file with the Department regarding this application.
5. The restaurant has been at this location for 45 years.
6. The applicant operated with a liquor license for two years with no liquor violations.
7. The applicant has owned the restaurant for 25 years and is found to be capable, qualified and reliable to operate the business.
8. The public convenience requires and the best interest of the community will be substantially served by the issuance of this license.

CONCLUSIONS OF LAW

1. The applicant has made a satisfactory showing of capability, qualifications and reliability to hold a liquor license pursuant to A.R.S. § 4-203, Subsection A.

2. The public convenience requires and the best interest of the community will be substantially served by the issuance of this license as required by A.R.S. § 4-203, Subsection A.

¶22 In reversing the Board's ruling, the superior court noted that "a review of each of the 12 criteria [set forth in R19-1-102] is telling." Explaining its conclusion that the Liquor Board had acted arbitrarily, the court stated:

> Although the Board unanimously found that the public convenience required and the best interest of the community would be substantially served by the issuance of a liquor license, the Board cites no evidence to support that finding and this Court can find no substantial evidence. In the absence of any actual findings of fact by the Board and this Court not finding substantial evidence to support its ultimate conclusions, this Court must conclude the Board erred granting the license. The only "findings" besides those boilerplate few findings by the Board are stated by the individual members as their reasons and criteria for granting the license.

¶23 Fugate argues "[t]he comments and discussion of the Liquor Board members (as cited by the Superior Court) are directly related to the guidelines setting forth criteria that the Liquor Board may consider, thus evidencing that this was not an arbitrary or capricious decision." And, Fugate contends, "[n]othing requires the Liquor Board to make a specific finding with regard to each of the criteria that it considers pursuant to A.R.S. § 4-201(I) and R19-1-102 of the Arizona Administrative Code."

¶24 As Gabrielson aptly points out, however, the Board was obligated to make some factual findings in support of its order rather than merely parroting in conclusory fashion the statutory prerequisites set forth in § 4-203(A) for issuance of a liquor license. Section 41-1092.07(F)(7), A.R.S., provides: "A final administrative decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the

underlying facts supporting the findings." We find that mandate clear, unambiguous, and unsatisfied by the Liquor Board's order granting the license here.

¶25 Noting the wisdom of an identical statutory requirement found in A.R.S. § 41-1063, Division One of this court has stated: "[Liquor license] applicants, as well as their opposition, are entitled to know the specific reasons why the Board has opted to grant or deny their applications. In addition, a statement of the facts supporting the Board's decision will provide a reviewing court with insight into the Board's decision." *City of Phoenix v. 3613 Ltd.*, 191 Ariz. 58, 61, 952 P.2d 296, 299 (App. 1997); *see also Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, ¶ 24, 962 P.2d 230, 237 (App. 1998) ("The requirement [in § 41-1063] for findings and conclusions is no mere formality" but, rather, "protects against careless or arbitrary action, facilitates judicial review, keeps agencies within their jurisdiction, aids parties' preparation of cases for rehearing and judicial review, and prevents judicial usurpation of administrative action."); *cf. Douglas Auto & Equip. v. Indus. Comm'n*, 202 Ariz. 345, ¶ 9, 45 P.3d 342, 344 (2002) ("[Administrative] findings must be specific, not only to encourage judges to consider their conclusions carefully, but also to permit meaningful judicial review.").

¶26 As noted above, *see* ¶ 21, *supra*, the Liquor Board's order did set forth factual findings and legal conclusions. The pivotal finding and conclusion, however, merely stated that "[t]he public convenience requires and the best interest of the community will be substantially served by the issuance of this license." Because those dispositive findings were merely "set forth in [the] statutory language [of §§ 4-201(G) and 4-203(A)]," "a concise and explicit statement of the underlying facts supporting the findings" was required. § 41-

1092.07(F)(7). Although Fugate claims the Liquor Board's findings were adequate and supported by the record, he neither addresses the express directive of § 41-1092.07(F)(7) nor adequately explains how the Liquor Board satisfied that requirement.

¶27 "The findings [required by statute] need not be detailed nor in any particular form, though the reviewing court must be able to discern how the agency reached its conclusion." *Shelby Sch.*, 192 Ariz. 156, ¶ 21, 962 P.2d at 237. "Although findings need not be exhaustive, they cannot simply state conclusions." *Douglas Auto*, 202 Ariz. 345, ¶ 9, 45 P.3d at 344. In short, "[a]n administrative agency's findings must be explicit enough to allow the court to intelligently review the agency's decision and to decide whether there is a reasonable basis for the decision." *Shelby Sch.*, 192 Ariz. 156, ¶ 21, 962 P.2d at 237; *see also Douglas Auto*, 202 Ariz. 345, ¶ 9, 45 P.3d at 344 ("[Administrative law j]udges must make factual findings that are sufficiently comprehensive and explicit for a reviewing court to glean the basis for the judge's conclusions.").

¶28 Here, as in *3613 Ltd*., "the Board essentially made no findings of fact" on the criteria governing its determinations, R19-1-102, or on the statutory prerequisites for issuance of a liquor license, § 4-203(A). *3613 Ltd*., 191 Ariz. at 61, 952 P.2d at 299. And, as in *Shelby School*, "[t]he Board failed to make basic findings of fact or conclusions of law and simply provided a conclusory statement as the basis for its decision." 192 Ariz. 156, ¶ 22, 962 P.2d at 237. "The decision does not provide us with the facts upon which it is based." *Id*. Accordingly, we cannot approve, and the superior court rightly refused to affirm, the Liquor Board's decision.

¶29 We do not concur, however, with the superior court's outright reversal of the Board's decision. Rather, "[r]emand to an administrative agency or board is appropriate where the agency has been found to have violated a statutory procedural requirement." *Caldwell v. Ariz. State Bd. of Dental Exam'rs*, 137 Ariz. 396, 401, 670 P.2d 1220, 1225 (App. 1983); *see also Shelby Sch.*, 192 Ariz. 156, ¶ 27, 962 P.2d at 238 ("the most appropriate remedy is to remand to the Board for further consideration" and for "adequate findings and conclusions" in support of its ultimate decision); *3613 Ltd.*, 191 Ariz. at 61, 952 P.2d at 299 ("revers[ing] and remand[ing] with instructions to the Board to make written findings of fact to support whatever decision it may make"). "This [remand procedure] grants the agency the opportunity to 'take a fresh look at the matter involved' in accordance with the applicable law." *Caldwell*, 137 Ariz. at 401, 670 P.2d at 1225, *quoting City of Tucson v. Mills*, 114 Ariz. 107, 110, 559 P.2d 663, 666 (App. 1976).

¶30 We share the superior court's frustration with the Liquor Board's failure "to issue detailed findings of fact" or to cite "any portion of the record supporting [its] findings." In view of those deficiencies, we certainly cannot fault the court for engaging in a quest to determine whether substantial evidence supported the Board's decision. But those very deficiencies make it virtually impossible for a reviewing court to make that determination. *See Ramirez v. HealthPartners of S. Ariz.*, 193 Ariz. 325, n.2, 972 P.2d 658, 659-60 n.2 (1998) ("'Judges are not like pigs, hunting for truffles buried in [the record].'"), *quoting United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (alteration in *Ramirez*).

¶31 Therefore, we do not rule on whether the Liquor Board's currently deficient decision is supported by substantial evidence in the already voluminous administrative

record. Rather, that determination can and should await the Board's full compliance with § 41-1092.07(F)(7). Only then can a court properly assess whether the record supports whatever "underlying facts" the Board may cite in support of its ultimate findings and conclusions. § 41-1092.07(F)(7). *See 3613 Ltd.*, 191 Ariz. at 61, 952 P.2d at 299 (in view of reversal and remand for Board to make more detailed findings, court did not address "arguments that the Board's decision is not supported by substantial evidence").

IV. Zoning issues

¶32 This brings us to the issue of zoning, a separate ground on which the superior court reversed the Liquor Board's decision and on which Gabrielson urges us to affirm. In its ruling, the superior court analyzed the county zoning ordinance, noting it "represents in many ways the definition of that which will substantially serve the best interest of a local community." *See* A.R.S. § 4-203(A). Stating that "the Board's legal interpretations and conclusions on zoning are not binding on [it]," *see Carondelet Health Servs.*, 182 Ariz. at 504, 897 P.2d at 1390, and that "[t]here is no competent evidence before the Board that zoning is proper," the court ruled the restaurant's sale of liquor would violate Fugate's nonconforming-use permit by changing the restaurant's existing use. *See Buckelew v. Town of Parker*, 188 Ariz. 446, 452, 937 P.2d 368, 374 (App. 1996) ("[A] change in the basic nature or character of that use may result in a loss of the property's protected status as a nonconforming use."). The court also criticized the Board for ignoring the fact that "the Mining Camp Restaurant is a non-conforming use in a single residence zoning district,"

"which does not allow for operation of any kind of restaurant with or without a liquor license."

¶33 As Fugate points out, however, the Board did not actually determine whether the liquor license would violate his nonconforming-use permit or would otherwise conflict with the county's zoning ordinance.[4] The only legal conclusions the Board reached were that Fugate had satisfied his burden of establishing both requirements prescribed by § 4-203(A). Thus, there was no legal conclusion about zoning for the superior court to review. *See Carondelet Health Servs.*, 182 Ariz. at 504, 897 P.2d at 1390. In fact, after acknowledging that the protestors' "main concern was zoning," one Board member stated the Board was "not qualified on making comments" on that legal issue. Rather, the Liquor Board apparently based its decision on Fugate's qualifications and ability to comply with the liquor laws and on its belief that a license would enable him to be competitive, preserve "the history of the area," and allow the restaurant to continue as a "destination" for tourists and families to enjoy the "old west."

¶34 Under state zoning law, the Pinal County Board of Supervisors is charged with adopting, amending, and enforcing zoning ordinances. *See* A.R.S. §§ 11-802, 11-829; *see also Mehlhorn v. Pima County*, 194 Ariz. 140, ¶ 4, 978 P.2d 117, 118 (App. 1998). And the county's board of adjustment, not the Liquor Board, is entrusted with interpreting those laws. A.R.S. § 11-807. Boards of adjustment are authorized by § 11-807(B)(1) and (2) to

[4]Therefore, we disagree with the superior court's suggestion that the Liquor Board "determin[ed] that the zoning is legal." In fact, that suggestion seems inconsistent with the court's correct observation that "the Board again made no findings at all" relating to zoning. Contrary to the court's insinuation, the record does not reflect any "legal interpretations and conclusions on zoning" by the Board.

interpret the county's zoning ordinance and to grant variances when, strictly interpreted, the ordinance would work an unnecessary hardship on a property owner. Section 11-807(D) sets forth a specific procedure for appealing to superior court from adverse decisions by the board of adjustment.

¶35 Pinal County's zoning ordinance essentially mirrors those statutory provisions by establishing a county board of adjustment and prescribing its powers and procedures. Pinal County Zoning Ordinance §§ 301(a), 2401-2508. The record does not reflect that the applicable zoning procedures were followed, or that the board of adjustment was involved in any way, in probing and deciding the zoning issues related to Fugate's nonconforming-use permit vis-à-vis the liquor license he sought.

¶36 Moreover, the Liquor Board's decision to grant the license does not deprive the county of its enforcement power or ability to revoke Fugate's nonconforming-use permit if it finds a violation of county zoning laws. *See* A.R.S. §§ 11-802, 11-806(A), 11-807, 11-830; Pinal County Zoning Ordinance §§ 301(E), 306, 825-A, 2403, 2501-2508; *see also Wonders v. Pima County*, 207 Ariz. 576, ¶ 7, 89 P.3d 810, 812 (App. 2004) (in view of "express statutory authority" under § 11-807(B)(1), county board of adjustment "should have an opportunity to interpret the [county zoning] Ordinance before any judicial inquiry into its alleged vagueness"); *cf. Lane v. City of Phoenix*, 169 Ariz. 37, 38, 816 P.2d 934, 935 (App. 1991) (city's board of adjustment determined valid nonconforming use).

¶37 The alleged zoning violation that would result from Fugate's obtaining and using a liquor license is a separate and distinct issue from those addressed by the Liquor Board in granting the license. *See Sevilla v. Sweat*, 9 Ariz. App. 183, 186, 450 P.2d 424,

427 (1969) (court concluded in zoning appeal that adding packaged beer and wine to neighborhood grocer's sales did not violate his nonconforming-use permit, but that conclusion unrelated to granting or denial of liquor license application, which was "different matter" than "problem of proper zoning"). Neither was the Liquor Board empowered to determine whether Fugate's nonconforming use would encompass the sale of liquor nor did it actually do so. Therefore, although the superior court and this court may independently review an administrative agency's legal conclusions, the superior court erred in basing its reversal on zoning-related principles when the Liquor Board had made no findings or legal conclusions on the restaurant's nonconforming-use status or other zoning issues, and had no authority to do so.

¶38 Gabrielson, however, contends the Liquor Board should not have disregarded the matter of zoning because its own administrative code, R19-1-102(3), permits the Board to consider whether the applicant has obtained "all necessary licenses and permits . . . from the state and all other governing bodies." "Zoning clearance," she asserts, "clearly falls within the ambit of that rule." Gabrielson further contends that "compliance with local zoning limitations constitutes a relevant consideration when assessing whether a liquor license applicant has met his burden under the 'best interest test,'" that the Liquor Board should "respect local zoning when approving liquor licenses," and that the Board "cannot approve a liquor license for a facility that lacks proper zoning." In general, we do not disagree with these propositions, at least in the abstract. If granting a liquor license indisputably would conflict with applicable zoning law, one could not reasonably conclude

"that the best interest of the community will be substantially served by the issuance." § 4-203(A).

¶39 Gabrielson's entire argument on this point, however, assumes the liquor license violates the county's zoning ordinance. Similarly, the superior court so concluded and stated that the BOS "made clear its position that it found this license would be in violation of its zoning." But we neither agree with the court's statement nor accept the underlying premise of Gabrielson's argument. The Pinal County Board of Adjustment was not asked to rule on this issue. And the BOS did not clearly or expressly find that the license would violate Fugate's nonconforming-use permit, but rather merely recommended denial of the application because "it's contrary to zoning." That vague comment, without any supporting explanation or clear basis, could refer merely to perceived incompatibility with the surrounding neighborhood and does not constitute a final, binding determination that the restaurant's service of alcoholic beverages would necessarily cause Fugate to lose his nonconforming-use permit or that such service would not be allowed under any circumstances in an area zoned for single-family residential use.

¶40 Indeed, the record contains evidence arguably supporting a contrary conclusion, inasmuch as the county at one point opined that a liquor license would not violate its zoning laws. For example, when Fugate first applied for a license in 2002, the Pinal County Planning and Development Services Department stated, "The zoning on this parcel will allow the sale and consumption of liquor sales [sic] on premises only." And in

January 2006, after Fugate had again applied for a license, the Director of that department stated, "The zoning on this parcel will allow the sale of liquor, approval is recommended."[5]

¶41 Additionally, in 2003 a deputy Pinal County Attorney prepared and submitted a memorandum addressing the issue of whether selling liquor at the Mining Camp would change the restaurant's existing nonconforming use under the county's zoning ordinance. She concluded that "[t]he sale of beer and wine, under the necessary liquor license, with the sale of food can be considered part of the non-conforming restaurant use." She also opined that the sale of hard liquor would change the existing use, thus requiring a zoning change or special use permit.[6] The superior court found that memorandum "not credible" and legally flawed, instead concluding that "zoning does not permit a license for the sale of beer and wine, let alone the license" that ultimately was granted. Regardless of whether the conclusions in the 2003 memorandum are accurate, the underlying problem remains. Neither that memorandum nor the BOS's vague and unexplained statement that the license

[5]In his affidavit that Gabrielson submitted below, the Director stated he had "responsibility for administering the Pinal County Zoning Ordinance."

[6]Fugate apparently relied on that memorandum, testifying at the Liquor Board hearing that he would serve only beer and wine because he believed serving hard liquor would deprive him of his nonconforming-use permit. We again note that interpretation of the zoning laws and the determination whether serving any liquor, even if only beer and wine, would change his existing use in such a way so as to lose the restaurant's nonconforming-use status is a matter for the county board of adjustment. *See* ¶ 34, *supra*. Therefore, we do not address the accuracy of the 2003 memorandum or the superior court's analysis and conclusions regarding zoning.

would be "contrary to zoning" leads us to conclude that the BOS's decision on zoning was "clear" or "unequivocal," as the court ruled.[7]

¶42 Most importantly, as Fugate correctly points out, this is not an appeal of a zoning decision. *See Sevilla*, 9 Ariz. App. at 186, 450 P.2d at 427. Rather, it is an appeal of the Liquor Board's decision. The Board unanimously voted to grant a liquor license to Fugate based on its conclusion, albeit statutorily noncompliant, that the two prerequisites of § 4-203(A) were met and its belief that a license would preserve the area's history and allow the restaurant to compete and continue as a "family-oriented" tourist "destination."

¶43 In sum, we agree with Fugate that "[t]he question before the Liquor Board, before the Superior Court, and before this Court is not a legal interpretation of the applicable zoning." For all of the reasons we have discussed, the superior court erred in reversing the Liquor Board's decision on zoning grounds.[8]

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[7]We recognize, as did the superior court, that the county's Director of Planning and Development Services (who authored the January 2006 memorandum and orally presented the "staff report" at the BOS hearing on Fugate's license application) and the deputy county attorney serve merely in an advisory capacity. *Cf.* A.R.S. § 11-802. Nonetheless, in view of the conflicting evidence on the zoning issue of nonconforming use; the lack of a clear, definitive administrative ruling on that issue; and the availability of applicable, heretofore unused, zoning procedures to properly litigate and resolve that issue, we cannot say as a matter of law that the Liquor Board's decision must be reversed based on zoning grounds.

[8]We do not address the constitutional arguments in Gabrielson's answering brief because we dispose of this appeal on other grounds, the superior court did not rule on them, and she arguably lacks standing to assert them. *See Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc.*, 186 Ariz. 97, 101, 919 P.2d 1368, 1372 (App. 1995) (courts should avoid resolution of constitutional issues by deciding cases on nonconstitutional grounds when possible); *see also Bennett v. Brownlow*, 211 Ariz. 193, ¶ 17, 119 P.3d 460, 463 (2005) ("To establish standing, we require that petitioners show a particularized injury to themselves."); *Sears v. Hull*, 192 Ariz. 65, ¶ 23, 961 P.2d 1013, 1018 (1998) (one raising constitutional challenge "must allege injury resulting from the putatively illegal conduct").

Disposition

¶44 We vacate the superior court's order of April 4, 2007, and the case is remanded to that court with instructions to remand the matter to the Liquor Board for any further proceedings it deems appropriate and for issuance of a new decision that fully complies with § 41-1092.07(F)(7).

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge